

NORTHWEST ENVIRONMENTAL ADVOCATES



July 17, 2013

FREEDOM OF INFORMATION ACT REQUEST

FOIA OFFICER, Region 1
U.S. Environmental Protection Agency
5 Post Office Square, Suite 100
Boston, MA 02109-03912

via e-mail only: r1foia@epa.gov

Re: Region I Water Quality Standards Actions

To whom it may concern:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, we are writing to request the disclosure of public documents within the control of your agency. I make this request on behalf of Northwest Environmental Advocates (NWEA).

NWEA is a non-profit environmental watchdog organization dedicated to preserving and protecting natural resources in the Pacific Northwest. NWEA works through education, advocacy, and litigation to protect and restore water in Washington, Idaho, and Oregon. The organization has a long history of interest and involvement in environmental issues in the Pacific Northwest, in particular seeking to use the Clean Water Act programs to restore and maintain water quality for the protection of human health, fish, and wildlife.

This FOIA request concerns EPA's actions or inactions on water quality standards submitted to Region 1 by the States of Maine, New Hampshire, Vermont, Connecticut, Massachusetts, and Rhode Island.

I. FOIA Request

This request applies to all described documents whose disclosure is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied), and (ii) explain in full the basis on which non-disclosure is sought. In the event that you determine that any of the requested documents cannot be disclosed in their entirety, we request that you release any reasonably redacted or segregable material that may be separated and released. Furthermore, for any documents, or portions thereof, that are determined to be potentially exempt from disclosure, we request that you exercise your discretion to disclose the materials, absent a finding that sound grounds exist to invoke an exemption.

Pursuant to this request, please provide all the following formal documents prepared or utilized by, in the possession of, or routed through EPA since January 1, 1993:

1. Submissions of water quality standards to EPA for approval by the States of Maine, New Hampshire, Vermont, Connecticut, Massachusetts, and Rhode Island;
2. EPA actions on all of the above submissions described in item no. 1 above, including approvals and disapprovals;
3. EPA decisions, if any, to take no action on any of the submissions described in item no. 1 above;
4. EPA requests, if any, to initiate consultation with the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service pursuant to the Endangered Species Act on any of the EPA approval actions described in item no. 2 above; and
5. EPA determinations, if any, that approval actions described in item no. 2 above would have "no effects" on any ESA-listed species.

It is NWEA's belief that EPA has ready access to at least the formal documents listed in item nos. 1 and 2 above for which reason we request that you provide an interim response to those items within the statutory response period.

If there are large documents that you suspect we may already have, please feel free to call us and ask in order to avoid waste and/or delay. If there are any other materials or categories of materials that you do not believe we would find useful, please contact us to discuss a possible narrowing of this request.

II. Fee Waiver Request

We hereby request a waiver of fees for costs incurred in locating and duplicating these materials, pursuant to 5 U.S.C. § 552(a)(4)(iii), because disclosure "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." Following is a response to the fee waiver requirements set out in 40 C.F.R. § 2.107(l)(1) and (l)(2)(i)-(ii).

NWEA's previous FOIA request HQ-FOI-01732-11, submitted on June 24, 2011, requested that EPA provide "all formal approval letters and formal support documents prepared since 1993 in which EPA has conditionally approved a state's water quality standards submission pending completion of some action including but not limited to completion of ESA § 7 consultation." In response, EPA provided no records from Region I. This FOIA request is a follow-up to the previous request in order to ascertain what state standards the Region has approved that should have been subject to ESA consultation but on which EPA may or may not have consulted. NWEA was granted a fee waiver for the previous request and should be granted a fee waiver on the instant request on the same basis.

A. Whether the subject of the requested records concerns "the operations or activities of the government."

This request concerns formal decision documents of EPA's on state submissions of water quality standards in Region I states. State standards are generally not applicable for Clean Water Act purposes until EPA has approved such standards and they are not applicable where EPA has disapproved them. EPA's actions or decisions to not take action on state submissions concerns the operations of the government because EPA action on such provisions is required under the Clean Water Act. Therefore, this fee waiver request involves records that are readily identifiable

as limited to “the operations or activities of the government,” specifically in this instance the operations and activities of the U.S. EPA to approve, disapprove, or decide to take no action on submitted water quality standards rules as well as to take action pursuant to the Endangered Species Act to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

B. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.

EPA’s actions on state water quality standards is sometimes available on EPA’s websites. In Region I they are not. In instances where EPA has taken action, sometimes EPA elaborates on what it believes the meaning of those standards and general policies are, meaning that the approval documents are not merely up or down decisions. In addition, depending on the year in which states submitted rules to EPA for action, pre- or post-“Alaska Rule” at 40 C.F.R. § 131.21(c), a state’s water quality standards are or are not in place for Clean Water Act purposes. Therefore, in the absence of information on EPA’s actions, it is often impossible to determine whether particular standards, or rules (e.g., general policies) that are set out in a state’s rules are applicable or not. Without access to EPA records there is no mechanism by which the public can gain insight into whether particular provisions in state rules are approved or applicable. Accordingly, the disclosure of records that will indicate whether EPA has approved, disapproved, or taken no action, along with records that provide the date of the state submission to EPA that governs the applicability of the Alaska Rule, are essential to the public understanding what rules EPA considers to be in force in Region I water quality standards. In addition, without access to records, should they exist, to demonstrate that EPA Region I has initiated consultation under the Endangered Species Act on Region I’s approval of states’ standards, the public has no way of knowing whether EPA has complied with the requirements of that law. Without access to these records, NWEA cannot assess why of all the EPA regions, Region I is the only regional office to not issue water quality standard approvals without reference to completion of ESA consultation as a condition. (This is the conclusion that can be drawn from the EPA response to NWEA’s FOIA request HQ-FOI-01732-11, submitted on June 24, 2011, for which EPA granted a fee waiver.)

Release of the requested records will allow the public to understand what action EPA has taken on provisions submitted by states in Region I pursuant to both the CWA and the ESA. To the best of our knowledge, Region I EPA does not post any information on its website about its actions on state submissions of water quality standards. Therefore, there is no other way to obtain this information on EPA actions other than through FOIA. For this reason, reviewing records of EPA’s action or inaction will be “meaningfully informative” and is therefore likely to contribute to an understanding of what standards are actually in place in Region I states and the policy and regulatory ramifications associated with those facts including whether EPA has ensured that the approved standards do not pose jeopardy to threatened and endangered species. Having such information is also “meaningfully informative” in that it ensures NWEA and other organizations do not engage in frivolous or unfounded litigation.

C. Whether disclosure of the requested information will contribute to “public understanding.”

Disclosure of the requested records to NWEA will contribute to public understanding because the organization has expertise in this subject area of the records, an intention to disseminate the

information obtained, and the connections with organizations and individuals across the country who are most likely to use the information contained within the records. NWEA has a track record of working with people as far away from Oregon as the State of Florida, including in New England, to assist them by conveying our understanding of EPA policies. NWEA is known for being generous with its time and information, despite its extremely limited resources. At a minimum, the audience for the information that NWEA has requested is environmental, fishing, tribal, and health organizations across the country which are interested in ensuring that water quality standards are sufficiently protective of human health, fish, and wildlife. More specifically, environmental organizations in Region I states are interested in water quality and its regulation. In the past, NWEA has shared similar information with state agencies, federal employees, tribal governments, as well as representatives of municipal and industrial dischargers. NWEA will continue to share such records as well as information analyzed from records with this same list of interests.

In addition to using its relationships and networks with environmental organizations and environmental attorneys across the country, NWEA will also disseminate the records and/or its analysis of the records through the following means, as appropriate: through the internet from its website, through commentary to the press, through public forums in which it participates, in its newsletters, through emails to networks of organizations, and through formal public comments and other formal documents prepared for agencies.

NWEA's investigation and evaluation of the records will be made available to other parties after it has been completed. NWEA will use the records requested to evaluate the quality of EPA decision-making and to better facilitate public participation in state and EPA processes during triennial reviews, TMDL development, and permit issuances, all of which occur regularly. NWEA's dissemination of the records and of its own evaluation of the records will educate the public and advance public understanding of EPA's decision-making. Thus, the release of these records will significantly contribute to the public's understanding and oversight of EPA's decision-making under the Clean Water Act and ESA.

NWEA has both the ability to interpret and to disseminate the records and/or information from this request because of its participation in all regulatory processes that take place under the Clean Water Act. NWEA has the expertise to evaluate this information and is able to disseminate the information from the records, or the records themselves, directly and indirectly with public interest organizations involved in state water credit trading and related regulatory activities through emails, phone calls, meetings, list serves specifically devoted to communications between public interest organizations, and through its website.

D. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Courts have held that the factor of whether the disclosure will contribute "significantly" to the public understanding is satisfied where the information requested is new, would supplement information currently available to the public, or add to the public oversight of the government's activities. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987); *Judicial Watch of Florida v. U.S. Justice Dept.*, 1998 U.S. Dist. LEXIS 23441, at *8 (D.D.C. 1998). The requested information has not, to the best of NWEA's knowledge, been released to the public and, therefore, qualifies as new. *Oregon Natural Desert Ass'n v. U.S.*

Dept. of Interior, 24 F. Supp. 2d 1088, 1095 (D. Ore. 1998) (finding that information supporting a Bureau of Land Management NEPA analysis, but which had not been released publicly, was new for the purposes of FOIA fee waiver). Unlike some EPA regional websites, there appears to be no place on the Region I site for any information or documents pertaining to the region's action on state submissions of water quality standards.

Where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, a court held that the group had met the dissemination prong of the public interest test:

Other courts have found requestors' statements of intent to disseminate requested information through newsletters, popular news outlets and presentations to the public interest groups, government agencies and the general public sufficient to entitle an organization to a fee waiver Therefore, in light of [Western Watersheds Project's] statements, the Court finds that WWP adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public. Moreover, the Court finds that if it adopted the BLM's position [that WWP would only disseminate information to a narrow audience], it would set the bar for fee waivers impermissibly high, especially in light of Congress' intent to have the fee waiver liberally construed.

Western Watersheds Project v. BLM, 318 F. Supp. 2d 1036 (2004). Moreover, courts have held that if it is a "close call" as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non commercial entity should be given the benefit of the doubt and be granted the fee waiver. *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10th Cir. 2005). Likewise, the court in *Southern Utah Wilderness Alliance v. BLM*, 402 F. Supp 82 (2005) held that an organization's statements describing how it has commented on similar issues in federal proceedings and issued a report on a similar matter was sufficient to show it had the expertise and ability to disseminate the requested information. And, as in some of the fee waiver requests addressed in this appeal, the records concern agency inaction, a court has found that a requestor's statements concerning the agency's failure to meet statutory requirements and how the requested records would shed light on those failures was sufficient to demonstrate that the request would make a significant contribution to the public understanding. *Physicians Committee for Responsible Medicine v. Dept. of Health and Human Services*, 2007 U.S. Dist. LEXIS 20855.

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA to oversee the activities of EPA in light of its actions and inactions pursuant to the CWA and ESA. It will also contribute to the ability of NWEA and others to oversee the activities of the EPA, with regard to TMDLs and permits that are intended to ensure that such standards are met. As discussed above, NWEA participates in state rulemaking, in EPA review of state rulemaking, in permitting actions and the issuance of TMDLs, and in litigation. NWEA also participates in matters of EPA national policy, in areas such as standards and TMDLs. It also shares documents and information with other organizations that engage in those activities. NWEA will also disseminate the information to organizations through listserves, websites, meetings, memoranda, and direct sharing of the records as appropriate. Only by understanding the EPA's actions and inactions can NWEA meaningfully participate in its public oversight watchdog function and assist other organizations

to do the same.

E. Commercial interests.

Where a court has found the request to be primarily in the requestor's commercial interest, there has been specific and clear evidence of that interest. *See, e.g., VoteHemp, Inc. V. DEA*, 237 F. Supp 55 (2002)(VoteHemp's website contained links to commercial interests and the requestor's mission included business promotion). There is no such concern here. NWEA has no commercial interest in the requested records. NWEA has no mechanism to obtain funds from the use of the records, does not promote the records or analysis of them as a commercial concern, and its website contains no links to commercial interests. NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Pacific Northwest and across the country. Therefore, the considerations of 40 C.F.R. 2.107(l)(1) with regard to the possible commercial interests of NWEA do not apply because NWEA has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis it may perform on the records sought.

In conclusion, for the reasons set forth above and in the additional materials filed herewith, Northwest Environmental Advocates is clearly entitled to receive a public interest fee waiver for this FOIA request.

We look forward to your response. Please feel free to contact me at 503/295-0490 or nbell@advocates-nwea.org if you have any questions about how to respond to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell", with a stylized flourish at the end.

Nina Bell
Executive Director